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No. 05-1378

In the
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,

v.

Cassandra COLLINS,
Respondent.

On Petition for a Writ of Certiorari
to the Alabama Court of Criminal Appeals

REPLY BRIEF FOR PETITIONER

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July 11, 2006

QUESTION PRESENTED

In *Davis v. United States*, 512 U.S. 452 (1994), this Court held that in order to trigger the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which deems *per se* invalid any confession or *Miranda* waiver following a suspect's request for the assistance of counsel, the suspect must "unambiguously" invoke his right to counsel.

The question presented here is whether *Davis*' clear-invocation rule applies only after a suspect has waived his *Miranda* rights and then, during interrogation, makes an ambiguous reference to a lawyer or, instead, also applies when the suspect ambiguously references a lawyer during the initial *Miranda* colloquy. There is a deep and entrenched split of authority on that question, which this case squarely implicates. The court below held that *Davis*' clear-invocation rule applies only in the post-waiver setting, as have the courts in Alaska, Maine, Maryland, South Dakota, and Utah. By contrast, the Seventh and Tenth Circuits, along with the state courts in Arkansas, California, the District of Columbia, Georgia, Illinois, Kansas, Michigan, Montana, Nevada, Oklahoma, and Wyoming, have held that *Davis* applies pre-waiver, as well.

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ARGUMENT

Collins' brief in opposition is as significant for what it doesn't say as for what it does. For the most part, Collins does not even engage the substance of the State's petition. Specifically, she does not dispute –

- that there is a clear and established split of authority concerning whether the clear-invocation rule of *Davis v. United States*, 512 U.S. 452 (1994), applies pre-waiver as well as post-waiver;
- that the split results directly from confusion over the meaning of this Court's own opinion in *Davis*;
- that the practical implications of the Question Presented are very real, for law enforcement officers and suspects, alike;
- that the policies that drove this Court's decision in *Davis* – "clarity" and "ease of application" for officers in the field – apply to precisely the same extent pre-waiver as post-waiver; and
- that the compact and undisputed record in this case makes resolution of the Question Presented simple and straightforward.

That much, therefore, seems to be common ground.

Rather than tackling the State's arguments on the merits, Collins labors mightily to convince the Court that this case is the "wrong vehicle for deciding the question presented." Br. in Opp. 14. Collins' "wrong vehicle" argument has two components, neither of which has any merit. First, she asserts repeatedly that the question of *Davis*' applicability was not presented to the state courts. *Id.* at 1, 14-16. That, we will show, is objectively and verifiably untrue. Second, as we anticipated she would (Pet. 8-11), Collins seeks to recharacterize the Court of Criminal Appeals' decision as turning not on *Davis* but, instead, on a run-of-the-mill, totality-of-the-circumstances-based voluntariness analysis. Br. in Opp. 16-18. There, too, Collins is just wrong. We will address Collins' arguments in turn.

I. The *Davis* Issue Was Both Presented To And Decided By The State Court Whose Decision This Court Is Asked To Review.

Collins' persistent suggestion that the question of *Davis*' applicability was not raised or addressed in the state courts is, with respect, baffling. She repeats the charge time and again - going so far as to make a jurisdictional argument out of it. Br. in Opp. 1. First, as to presentation, she says that the *Davis* issue "was never raised in the state courts below." *Id.* at 14; *see also id.* at 4 ("never presented"). That is categorically untrue. It is not even debatable. Both during the suppression hearing in the trial court and in its brief to the Court of Criminal Appeals - whose decision this Court is asked to review - the State repeatedly argued that *Davis* controlled the analysis. During the suppression hearing alone, the prosecutor referenced *"U.S. v. Davis"* at least four times for the proposition that a suspect's request for an attorney "has to be unequivocal and unambiguous." Pet. 4-5; App. 20a, 21a, 23a (citing *Davis*). The State's brief to the Court of Criminal Appeals is likewise littered with citations to *Davis*; there, the State contended that because Collins had "made no unequivocal and unambiguous invocation of her right to counsel" as required by *Davis*, the trial court was wrong to employ the *per se* rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), to test the validity of Collins' waiver. Br. of Appellant 1; *see also id.* at 11, 12, 15, 16, 17, 18, 19, 20, 23 (citing *Davis* to show that Collins' ambiguous statement did not trigger *Edwards*' prophylactic rule). Indeed, in her responsive brief to the Court of Criminal Appeals, Collins herself faulted the State for citing *"Davis* and/or the *Davis* standard" *too often* - "twenty-six (26) times in its brief." Br. of Appellee 15.[1] Ultimately, and somewhat schizophrenically, Collins correctly acknowledges here that the State "relied on

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[1] Collins' Rule 14.1(g)(i) argument is groun 'less. The petition's procedural-history discussion (Pet. 3-11) is chock full of citations specifying precisely when, where, and how the *Davis* issue was raised and resolved.

Davis as the controlling authority in this case at the suppression hearing" and "zealously" pressed its *Davis* argument in the Court of Criminal Appeals. Br. in Opp. at 5, 8-9.[2]

Second, as to consideration, Collins asserts that "neither the Alabama Supreme Court nor the Court of Criminal Appeals addressed" the matter of *Davis'* applicability. Br. in Opp. 15. Again, patently false. In fact, the Court of Criminal Appeals - here, "the state court that rendered the decision [this Court has] been asked to review," *Adams v. Robertson*, 520 U.S. 83, 86 (1997) - addressed the *Davis* question at length and in detail.[3] If it *seems* from Collins' brief in opposition that the Court of Criminal Appeals didn't consider *Davis*, it is only because Collins studiously avoids any mention of that court's extended discussion (referenced in the State's petition, Pet. 7-8, 14-15) of the *Davis* issue. To eliminate any uncertainty, we quote here the relevant portion of the Court of Criminal Appeals' decision *in toto*:

> The State contends that *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), mandates a reversal of the trial court's ruling. In *Davis*, the United States Supreme Court held that, after a suspect waives his *Miranda* rights, questioning must cease during an interrogation only when the suspect makes an unambiguous and unequivocal invocation of the right to counsel. The United States Supreme Court did not

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[2] It was not necessary, as Collins seems to suggest (Br. in Opp. 16), for the State to feature in the lower courts the split of authority concerning *Davis'* pre-waiver applicability. The Alabama Court of Criminal Appeals does not exist to resolve interstate disagreements concerning federal constitutional questions; this Court does. This case unquestionably arose in the pre-waiver setting, and the State expressly contended that *Davis* should control. That is plainly sufficient.

[3] That the Alabama Supreme Court did not address the *Davis* issue in its summary order quashing certiorari (Br. in Opp. 1, 15) is irrelevant. *See* R. Stern, et al., *Supreme Court Practice* 168 (8th ed. 2002) ("An order of a court of last resort declining to review a case is not ordinarily the judgment that is reviewable under §1257(a); in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction.").

in *Davis* create a requirement that officers ask clarifying questions when an ambiguous assertion of the right to counsel was made, although the Court acknowledged that asking questions for clarification would often be good practice for officers. In *Davis*, the suspect made an equivocal statement regarding counsel after he had already waived his *Miranda* rights. *Davis*, 512 U.S. at 461, 114 S. Ct. 2350 ("We therefore hold that, *after* a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." (emphasis added)). This Court has not specifically considered whether *Davis* applies to pre-waiver situations, but other appellate courts have considered this issue. We agree with the analysis and decision as discussed in *Freeman v. State*, 158 Md. App. 402, 857 A.2d 557 (2004), and we adopt it here.

The Court in *Freeman* stated:

> "We are persuaded by the reasoning of the court in *State v. Leyva*, 951 P.2d 738 (Utah 1997), which distinguishes between an ambiguous response to an initial *Miranda* advisement and an equivocal post-waiver invocation. The Supreme Court of Utah declined to apply *Davis* to an ambiguous pre-waiver response, concluding that *Davis* was limited to a post-waiver ambiguous invocation of rights. *Id.* at 745. According to the Utah court, that scenario is an 'entirely separate' issue from an ambiguous pre-waiver invocation. *Id.*
>
> "Noting that *Davis* did not 'address' or 'extend to prewaiver scenarios ....', the Utah court said that '*Davis* made clear that its holding applied only to a suspect's attempt to *reinvoke* his *Miranda* rights "*after* a knowing and voluntary waiver" of the same.' *Id.* (quoting *Davis*, 512 U.S. at 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362). Therefore, the Utah court concluded that an officer faced with an ambiguous response to an initial

> advisement of *Miranda* rights, i.e., at the pre-waiver stage, is limited to posing questions designed to clarify the suspect's ambiguous response. *Id. Accord State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (adopting *Leyva* and concluding that '[t]he *Davis* holding obviously applies to instances where suspects attempt to invoke *Miranda* rights after a knowing and voluntary waiver of those rights. *Davis*, in sum, applies to an equivocal postwaiver invocation of rights.').
>
> "We agree with the Utah court that a careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during the interrogation, arguably sought to exercise his rights. Based on the foregoing, we decline to apply the rationale of *Davis* to our analysis of appellant's silence, because the silence occurred in a pre-waiver context."

Freeman, 158 Md. App. at 428-29, 857 A.2d at 572-73.

Therefore, we hold that *Davis* does not apply to this case. Collins's questions were directed to the delay involved in obtaining a lawyer, and she asked them before she signed the waiver-of-rights form. Because Collins did not waive her *Miranda* rights before she asked the questions about obtaining a lawyer, the ambiguity of her questions required the interrogating officer to ask follow-up questions to clarify the ambiguity. The United States Supreme Court's decision in *Davis* did not preclude the trial court from granting the relief Collins requested in her motion to suppress. To the contrary, because Collins asked, "And I *will have to wait* til when?" (Supp. R. 15) (emphasis added), and because the officer ignored the question, there remained an ambiguity regarding whether Collins wanted to talk to an attorney. We find that, under the

> facts of this case, the officer had a duty to clarify on the record whether Collins wanted to contact her own attorney, whether she was indigent and needed appointed counsel, or whether she wanted to waive her *Miranda* rights and answer questions. From the record before us, we cannot find the knowing and voluntary waiver of rights required by *Miranda*.

App. 10a-12a.

There is simply no doubt that the Court of Criminal Appeals - again, the court whose decision this Court is asked to review, *see Adams*, 520 U.S. at 86 - squarely addressed the question whether *Davis* should be extended to apply pre-waiver as well as post-waiver. Collins' contention to the contrary is baseless and, frankly, desperate.

II. The State Courts Decided This Case On *Davis* Grounds, Not Ordinary Voluntariness Grounds.

Collins' second angle - which we anticipated (Pet. 8-11) - is to suggest that "this case was not decided on *Davis*" grounds (Br. in Opp. 16) and that, instead, the "real issue" is "whether Collins understood her *Miranda* rights in light of the totality of the circumstances" (*id.* at 9). Collins is just wrong about that, as the evidence overwhelmingly demonstrates. As an initial matter, there is the extended discussion of *Davis* quoted above and the fact that on the heels of that discussion, the Court of Criminal Appeals concluded as follows: "Therefore" - that is, because we are dealing here with pre-waiver ambiguity - ***"we hold that* Davis *does not apply to this case."*** App. 12a (emphasis added). That, notably, is the only place in which Court of Criminal Appeals purported to "hold" anything. Collins' contrary assertion (unsupported by any citation) that the court's "holding" is that she "did not knowingly and intelligently waive here *Miranda* rights" under the totality of the circumstances (Br. in Opp. 17) cannot be squared with the record. The Court of Criminal Appeals didn't say that; indeed, it said just the opposite, *i.e.*, that the central question in the case (the question on which its "hold[ing]" turns) is the applicability of *Davis*.

The *Davis* "hold[ing]" aside, Collins has also completely failed to come to grips with the evidence cited in the petition. There, we explained that the language and structure of the state courts' decisions give rise to only one "fair reading" - namely, that "both the trial court and the Court of Criminal Appeals applied a *per se* rule that tied the 'voluntariness' - and thus the validity - of Collins' waiver singularly and inextricably to the officers' failure to terminate the interview or to ask clarifying questions following Collins' ambiguous statement about counsel." Pet. 9. For support, we pointed first to specific language in the lower courts' opinions that, standing alone, makes clear that the case was decided "on the basis of a *per se* rule, not a totality-based voluntariness analysis." Pet. 9-10 (*e.g.*, "the officers should have answered Collins's question and, *because they did not*, Collins did not knowingly and voluntarily waive her right to counsel"; "[t]he officers' failure to clarify the ambiguity before placing the waiver-of-rights form in front of Collins for her signature *prevents us from determining* that Collins's signature on the form satisfied the State's burden of proving that she knowingly and voluntarily relinquished her rights" (quoting App. 6a, 10a)). Rather than making some effort to deal with that language in her opposition, Collins simply ignores it. Second, we observed in the petition that if the Court of Criminal Appeals *had* concluded that Collins' waiver "was involuntary in the totality-of-the-circumstances sense, there would have been no need whatsoever for it to consider *Davis*' applicability (which, of course, it did at length and in detail)." *Id.* at 10. The fact, we said, that "the court went ahead and resolved the *Davis* question demonstrates that the *Davis* question - and not a free-floating voluntariness analysis - drove its decision." *Id.* Again, no response from Collins.

Even in the face of the Court of Criminal Appeals' detailed discussion of - and self-described "hold[ing]" concerning - *Davis*' applicability and the other textual and structural indicators we have highlighted, Collins persists in her assertion that this is actually a totality-of-the-circumstances case. Thus, Collins says in her opposition that factors bear-

ing on a totality-based voluntariness analysis should include "the background, experience and conduct of the accused" as well as "the conduct of the[] police," and emphasizes that at the time of her interrogation "Collins was barely twenty-one years old, with no prior experience with the criminal justice system." Br. in Opp. 1, 6, 7-8. All of that may well be true, *but it only serves to prove our point that the Court of Criminal Appeals' decision is not based on a totality-based voluntariness analysis.* There is *no* mention in that court's opinion of the various contextual considerations to which Collins refers. No discussion of Collins' age or experience; no suggestion of mental duress; no hint of police coercion. By contrast, the Court of Criminal Appeals' opinion, as we have shown, turns on a single fact - the officers' "failure to terminate the interview or to ask clarifying questions following Collins' ambiguous statement about counsel." Pet. 9.

In the end, Collins points to only two passages in support of her totality-of-the-circumstances reading of the Court of Criminal Appeals' opinion. Neither is availing. The first (Br. in Opp. 9-10) is nothing more than a throat-clearing block-quote of the ordinary voluntariness standard. The second (*id.* at 10) is simply a summary of the *Miranda* colloquy between Collins and the interviewing officers, including, specifically, Collins' ambiguous statement concerning counsel. The Court of Criminal Appeals' recitation of the colloquy, however - and particularly its emphasis on the officer's failure to answer Collins' question - hardly suggests a totality-of-the-circumstances approach. By contrast, in the very next paragraph, the court expressly "agree[d]" with the trial court's determination that "the officers should have answered Collins's question and, *because they did not*, Collins did not knowingly and voluntarily waive her right to counsel." App. 6a (emphasis added).

In sum: While perhaps not a portrait of clarity, the Court of Criminal Appeals' ruling, by its own terms, turns solely on Collins' ambiguous statement about counsel, *not* on some

gestalt analysis of the various contextual factors that constitute a freewheeling, totality-based voluntariness inquiry.[4]

* * *

There is one final point. The root of Collins' error here – an error that infects her entire vehicle-based argument – is her misunderstanding of the relationship between the *Davis/Edwards* analysis, on the one hand, and simple, totality-based voluntariness, on the other. Collins persistently tries to separate the two and then argue that the State is estopped from arguing one or the other. She says, for instance, that "[t]his case is about the standard for waiving the right to counsel, not the standard for invoking it" and, therefore, that "*Davis* does not apply." Br. in Opp. 16. But as we have explained in some detail (Pet. 10, 27-28) the invocation and waiver issues are intertwined. Specifically, resolution of the invocation question – *i.e.*, the determination whether a suspect has unambiguously invoked her right to counsel as required by *Davis* – establishes which of two very different waiver rules applies. On the one hand, where a suspect is Mirandized and then (without invocation) waives, the question is whether the waiver was voluntary, knowing, and in-

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[4] The Court of Criminal Appeals' citation to *State v. McDevitt*, 484 So. 2d 543 (Ala. Crim. App. 1985), does not aid Collins' effort to recharacterize this as a totality-of-the-circumstances case. Br. in Opp. 11-12, 17. First, *McDevitt* is quite expressly *not* a totality decision; in fact, the court there emphasized that "the record offers no insight into McDevitt's background or experience, which a court usually considers in deciding whether a waiver was knowingly made." 484 So. 2d at 548. Like this case, *McDevitt* was decided on the basis of a *per se* prophylactic rule requiring police officers, *as a matter of federal constitutional law*, to clarify ambiguities in suspects' statements concerning counsel. *Id.* at 549 ("[The officer] should have made an inquiry to clarify the ambiguity and to specifically advise McDevitt, at that time, that appointed counsel would be provided, if desired, before questioning proceeded."). Second, as Collins herself makes clear, *McDevitt*'s *per se* clarify-or-terminate rule is, like the rule applied in this case, inconsistent with at least one view (indeed, the prevailing view, *see* Pet. 18-21) of *Davis*. Br. in Opp. 11 ("The State's representation to the lower courts that under *Davis*, a police officer need not ask clarifying questions on these facts, was mistaken and contrary to" *McDevitt*).

telligent in the *Johnson v. Zerbst*, 304 U.S. 458 (1983), totality-of-the-circumstances sense. On the other hand, where a suspect actually invokes her right to counsel under *Davis*, she obtains the benefit of a more stringent rule (under *Edwards*) that renders any subsequent waiver *per se* invalid, regardless of real-world voluntariness. "The point," as we have said, "is that where *Edwards*' extra protection – its 'second layer of prophylaxis' – is triggered by a suspect's invocation, the waiver analysis shifts dramatically from one that requires the State to demonstrate validity under *Zerbst* to one that conclusively presumes the waiver invalid (no matter how voluntary, knowing, and intelligent in the *Zerbst* sense)." Pet. 28. From the very outset, the State's position here has been (1) that *Davis* applies to Collins' ambiguous statement about counsel and, therefore, that *Edwards*' *per se* rule does not; (2) that, accordingly, the default totality-based voluntariness analysis governs; (3) that under a totality-based analysis, Collins' waiver was voluntary; and, critically, (4) that the state courts decided the case on *Davis* grounds and, therefore, never made a proper totality-based voluntariness inquiry. That remains our view.[5]

CONCLUSION

The petition for certiorari should be granted.

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[5] Collins' confusion concerning the interplay between the invocation and waiver issues is the source of her misguided argument that the State "abandoned" arguments in its certiorari petition to the Alabama Supreme Court. Br. in Opp. 18-19. Collins faults the State for "focus[ing] entirely on the totality of the circumstances" in its cert petition and for arguing there that the Court of Criminal Appeals had incorrectly fixated on the officers' failure to answer Collins' question about counsel. *Id.* But in the context of the litigation, that position makes perfect sense. Our position has always been that an *Edwards*-like *per se* rule is inappropriate here and that, instead, the lower courts should have engaged in a traditional totality-based analysis (which, we have always said, Collins' waiver would survive). The point of our petition to the Alabama Supreme Court was simply that the lower courts had used the wrong standard; hence, what Collins assails as the "focus" on "the totality of the circumstances."

Respectfully submitted,

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